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Supreme Court, U.S.
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No. 95-608

In The

Supreme Court of the United States

October Term, 1995

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, HOLYWELL CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Petitioners,

v.

FRED STANTON SMITH, individually and as Trustee of the MIAMI CENTER LIQUIDATING TRUST; THE BANK OF NEW YORK; THE CITY NATIONAL BANK OF MIAMI, as Trustee under Land Trust #5008793; M. C. HOLDINGS PARTNERS, a New York General Partnership, and its General Partners, namely, ROBANK CORPORATION, H.D. LIQUIDATION, INC., ZENTAC INVESTMENTS, INC., BOTT FLORIDA HOLDING CORPORATION, AMERICAN SECURITY, LTD., and M. CENTER CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER HOLYWELL CORPORATION

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SUPPLEMENTAL BRIEF FOR PETITIONER HOLYWELL CORPORATION

In accordance with Rule 25.5 of the rules of this Court, the petitioner Holywell Corporation, through its undersigned counsel, respectfully submits this supplemental brief concerning the unpublished opinion of the Eleventh Circuit Court of Appeals, entered on December 21, 1995, in *Holywell Telecommunications Company v. City National Bank of Miami, as Trustee, M. C. Holdings Partners, et al.*, No. 94-5219 (see Appendix).

The court of appeals affirmed the district court's affirmance of the removal from the State Court of Holywell Telecommunications Company's ("HTC") cause of action filed after confirmation of the consolidated plan of reorganization proposed by the Bank of New York ("bank") on behalf of the debtors Miami Center Limited Partnership ("MCLP"), Chopin Associates, Miami Center Corporation, Theordore B. Gould, and Holywell Corporation.

HTC's complaint sought (a) an accounting of the revenue taken by the defendants under certain leases between HTC and third party lessees, (b) damages for breach of constructive trust, and (c) damages for tortious interference with contractual relations concerning property not part of the estate of any debtor.

The undisputed facts were as follows:

(1) The petitioner Holywell was HTC's parent company.

(2) HTC was solvent and did not file a petition in a bankruptcy court under any chapter of title 11.

(3) HTC was severally liable as a member of an affiliated group for the payment of taxes asserted against Holywell Corporation & Subsidiaries. *See,* Treas. Reg. § 1.6012-3(b)(4).

(4) HTC was licensed as a common carrier to sell and resell long distance telecommunications services; it leased equipment to Southern Bell, Chase Bank International, and other third party users; and it provided maintenance services for the leased equipment.

(5) The debtor MCLP was not a party to the third party leases and HTC did not file a claim against MCLP's estate with respect to the third party leases.

(6) The defendants City National Bank of Miami, as trustee, M. C. Holdings Partners, *et al.,* purchased the Miami Center from Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust ("trustee"), under the provisions of the bank's plan, for the appraised fair market value of $255,600,000, on October 10, 1985.

(7) The bank's appraisal did not include the fair market value of HTC's property and under the substantive consolidation provision of the bank's plan only claims attributable to the property leased to MCLP and "used in the Pavillon Hotel" were to be eliminated.

Nevertheless, the court of appeals held that the bankruptcy court had subject matter jurisdiction over this case and a bankruptcy judge had statutory authority to dismiss the complaint as a case under title 11 and a core proceeding arising under title 11 in accordance with 28 U.S.C. § 157(b)(1), having also concluded that "the bankruptcy court did not err in relying on this court's earlier

mootness rulings,"[1] which is the subject of this petition for writ of certiorari.

The court of appeals' adoption of the doctrines of *res judicata* and collateral estoppel to sanction the trustee's conveyance of HTC's property to the Miami Center's buyer *without* consideration, see Pet. 5, n.8 (in reliance on the district court's conclusion in a proceeding concerning property leased to MCLP[2]) shows the importance of granting this petition and concluding that it is no longer equitable for the *Miami Center* mootness rulings to have prospective application to unjustly enrich the Bank of New York in violation of the "takings clause" of the Fifth Amendment, see Pet. 25-30. The Eleventh Circuit also

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[1] *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988).

[2] The district court held, in relevant part:

> . . . by virtue of the substantive consolidation of the Debtor's estates and the establishment of a Liquidating Trust . . . title to the [capital] stock passed to the Liquidating Trustee . . . [and] [t]he Liquidating Trustee thereby obtained Holywell's right to acquire the assets of HTC/HLC by either liquidating the two corporations or causing them to distribute a dividend to the Liquidating Trust.

Holywell Telecommunications Company and Holywell Leasing Company v. Bank of New York, Case No. 85-3431-Civ-Kehoe (S.D. Fla., May 24, 1989) [Judge Kehoe also held, in the related tax case previously before this Court, that the Liquidating Trustee "is a contract trustee . . . [and] the Liquidating Trustee's non-discretionary duties to identify and pay allowed claims in accordance with the terms of the Amended Plan are more akin to those of a disbursing agent, rather than an assignee or fiduciary." *Holywell Corporation v. Smith, et al.*, Case Nos. 88-0795, 88-1053-Civ-Kehoe, July 31, 1989)]; *see, supra* at 2, *citing* Treas. Reg. § 1.6012-3(b)(4); also Treas. Reg. § 1.336-1.

continues to ignore conflicting opinion on the merits that the bank's amended plan was erroneously confirmed. *See In re Holywell Corp.*, 913 F.2d 873, 880 (11th Cir. 1990).

For the foregoing reasons, and the reasons previously stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. MUSSELMAN
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Holywell Corporation

App. 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-5219
Non-Argument Calendar

D. C. Docket Nos. 88-2070-CIV-SMA
87-0335-BKC-SMW-A

IN RE: HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES, and
THEODORE B. GOULD,

Debtors,

HOLYWELL TELECOMMUNICATIONS CO.,

Plaintiff-Appellant,

versus

CITY NATIONAL BANK OF MIAMI,
as Trustee,
M.C. HOLDINGS PARTNERS,
ROBANK CORPORATION,
H.D. LIQUIDATING INC.,
ZENTAC INVESTMENTS INC.,
BOTT FLORIDA HOLDING CORP.,
AMERICAN SECURITY LIMITED,
M. CENTER CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(December 21, 1995)

Before EDMONDSON, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

Holywell Telecommunications Company ("HTC") appeals the district court's order affirming the bankruptcy court's dismissal of its complaint. We affirm.

The bankruptcy court had subject matter jurisdiction over this case. *See* 28 U.S.C. § 157(b)(1). HTC's claims are barred by the doctrines of res judicata and collateral estoppel. *See Israel Discount Bank Ltd. v. Entin*, 951 F.2d 311, 314 (11th Cir. 1992); *In re St. Laurent, II*, 991 F.2d 672, 675 (11th Cir. 1993). HTC is barred from raising a new theory of recovery for the first time on appeal. *See United States v. Southern Fabricating Co.*, 764 F.2d 780, 781 (11th Cir. 1985). And, the bankruptcy court did not err in relying on this court's earlier mootness rulings. *See Miami Ctr. Ltd. Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988).

AFFIRMED.